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Attorneys for Defendant
HOMAX PRODUCTS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO TECHNOLOGY INC.,

Plaintiff,

v.

AERO PRODUCTS INTERNATIONAL INC.
et al.,

Defendants.

Case No. 10 CV-02994-JF

**MOTION FOR ADMINISTRATIVE
RELIEF TO PERMIT DEFENDANT
HOMAX PRODUCTS, INC. TO
SUPPLEMENT AND AMEND ITS
PENDING MOTION TO DISMISS
PURSUANT TO RULE 12(B)(6)**

Judge: Hon. Judge Jeremy Fogel
Courtroom: Courtroom 3, 5th Floor

MOTION FOR ADMINISTRATIVE RELIEF

Defendant Homax Products, Inc. ("Homax"), by and through its counsel of record, has already filed a Notice of Motion and Motion to Dismiss Pursuant to Rule 12(b)(6) Under Rules

8(a) and/or 9(b) (Homax’s “Rule 12(b)(6) Motion”) in this case. (Dkts. 152-55, 250-51). Homax, by and through its counsel of record, hereby requests that the Court permit it to supplement and amend its pending Rule 12(b)(6) Motion. Specifically, Homax requests the Court’s permission to expand the bases argued for granting of Homax’s Rule 12(b)(6) Motion by way of joining in Part IV.B. of co-defendant Calico Brands, Inc.’s (“Calico Brands”) Notice of Motion and Motion to Dismiss (Dkt. 203), entitled “Plaintiff Fails to State a Claim Because Calico’s Products At Issue Are Not ‘Unpatented’ Articles” and also submitting its own arguments in support of this additional basis for dismissal under Rule 12(b)(6). A copy of Homax’s Notice of Motion and Motion to Dismiss Pursuant to Rule 12(b)(6) and Joinder in Pending Motion to Dismiss that it seeks to file in further support of its pending Rule 12(b)(6) Motion is attached hereto as Exhibit A.

The Ninth Circuit allows a motion under Fed. R. Civ. P. 12(b) to be filed any time before the responsive pleading is filed. *Aetna Life Ins. Co. v. Alla Medical Servs., Inc.*, 855 F.2d 1470, 1474 (9th Cir. 1988). Nothing in Fed. R. Civ. P. 12(g) or (h) provides to the contrary. More specifically, although Fed. R. Civ. P. 12(g) sets forth a limitation on further motions, “[e]xcept as provided in Rule(h)(2) or (3),” courts within the Northern District of California (relying upon Ninth Circuit precedent) have clearly stated that: “Rule 12(h) ‘does not in any way prevent a judge in his discretion from permitting a party to expand the grounds of motion well in advance of a hearing.’” *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1118-19 (N.D. Cal. 2007) (quoting *Bechtel v. Liberty Nat’l Bank*, 534 F.2d 1335, 1341 n.8 (9th Cir. 1976) (wherein the Ninth Circuit held that the defendant’s amended motion asserting improper venue was timely and should have been granted even though it was filed more than two months after its original motion to dismiss because it was filed well in advance of the hearing and the required responsive pleading, i.e., the answer to the complaint)). Therefore, Homax respectfully requests that this Court exercise its discretion and allow Homax to expand the basis of its pending Rule 12(b)(6) Motion at this time, which is well in advance of the noticed hearing date of November 19.

Homax's proposed supplement and amendment to its pending Rule 12(b)(6) Motion is being made in good faith. It is also being submitted before the Court has ruled on Homax's pending Rule 12(b)(6) Motion, and, thus, does not require the Court to consider two separate, serially-filed 12(b)(6) motions from Homax. Further, granting this Administrative Motion will not prejudice Plaintiff for at least the following three reasons:

First, Homax has not waived its right to assert the legal basis raised in its proposed supplement and amendment. It is well-established that "the court may consider the defense of failure to state a claim *at any time before trial.*" *Id.* at 1118 (emphasis added). Rule 12(h)(2) specifically provides that a defense of failure to state a claim may be made in any Rule 7(a) pleading permitted or on a motion for judgment on the pleadings or at trial on the merits. *Id.* (citing *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980)). Therefore, even were the Court to deny this Administrative Motion and decline to allow Homax's proposed supplement and amendment to its pending Rule 12(b)(6) Motion, Homax could potentially raise the same expanded basis for dismissal in its answer, in a motion for judgment on the pleadings, or at trial. However, Homax submits that judicial economy would be best served by allowing Homax's additional basis in support of dismissal under Rule 12(b)(6) to be heard along with co-defendant Calico Brands' related motion on the consolidated hearing date of November 19.

Second, Homax's proposed supplement and amendment stems from its joinder in an earlier motion filed by one of its co-defendants in this case. Because the legal basis supporting Homax's proposed supplement and amendment has already been raised by another co-defendant in this case, Plaintiff is already on notice of the argued basis for dismissal and will already be required to respond to this additional basis for dismissal in an opposition to Calico Brands' pending motion to dismiss. In fact, Plaintiff could even submit one opposition to both Calico Brands' motion and Homax's proposed supplement and amendment. Accordingly, Homax submits that Plaintiff will not be prejudiced if Homax's expanded basis for dismissal is heard and adjudicated along with the motion to dismiss that has already been filed on the same legal basis by co-defendant Calico Brands.

13
14 Dated: October 15, 2010

By: /s/
Jenny L. Sheaffer (*Pro Hac Vice*)
BENESCH, FRIEDLANDER, COPLAN
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Attorneys for Defendant
HOMAX PRODUCTS, INC.

EXHIBIT A

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HOMAX PRODUCTS, INC.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SAN FRANCISCO TECHNOLOGY INC.,

Plaintiff,

v.

AERO PRODUCTS INTERNATIONAL
INC., et al.

Defendants.

Case No. 10 CV-02994-JF

**DEFENDANT HOMAX PRODUCTS,
INC.'S NOTICE OF MOTION AND
MOTION TO DISMISS PURSUANT TO
RULE 12(B)(6) AND JOINDER IN
PENDING MOTION TO DISMISS**

Judge: Hon. Judge Jeremy Fogel
Date: November 19, 2010
Time: 11:00 a.m.
Courtroom: Courtroom 3, 5th Floor

NOTICE OF MOTION

PLEASE TAKE NOTICE, that on November 19, 2010 at 11:00 a.m., or as soon thereafter as this matter may be heard, before the Honorable Judge Jeremy Fogel, at the United States District Court for the Northern District of California, 280 South 1st Street, San Jose, California, in Courtroom 3, 5th Floor, Defendant Homax Products, Inc. ("Homax"), by and

1 through its counsel of record, will move the Court pursuant to Fed. R. Civ. P. 12(b)(6) for an
 2 Order dismissing Plaintiff San Francisco Technology Inc.'s ("SFT") Complaint against Homax.
 3 This Motion is based on the Memorandum of Points and Authorities herein, the pleadings and
 4 papers on file in this action, such matters as the Court may take judicial notice, and argument and
 5 evidence to be presented at the hearing on this Motion.

6 Further, PLEASE TAKE NOTICE that Homax hereby joins in the following Motion
 7 made by its co-defendant in this case:

8 (1) Defendant Calico Brands, Inc.'s ("Calico Brands") Amended Notice of Motion and
 9 Motion to Dismiss (Dkt. 203), Part V.B. entitled "Plaintiff Fails to State a Claim Because
 10 Calico's Products At Issue Are Not 'Unpatented' Articles.'"

11 Homax submits that the Homax products alleged in the Complaint to be falsely marked cannot,
 12 *as a matter of law*, constitute "unpatented articles" under 35 U.S.C. § 292, because, irrespective
 13 of being marked with two allegedly expired patent numbers, those Homax products are
 14 indisputably marked with sixteen additional patent numbers that are neither alleged by Plaintiff
 15 to be expired nor to not cover the Homax products. Thus, for the reasons set forth in the above-
 16 mentioned Motion and supporting Memorandum of Points and Authorities by Calico Brands, and
 17 the reasons set forth in Homax's own Memorandum of Points and Authorities herein, Homax
 18 respectfully requests that this Court dismiss SFT's Complaint under Rule 12(b)(6).

19 **RELIEF REQUESTED**¹

20 Homax seeks dismissal of SFT's claims against Homax pursuant to Fed. R. Civ. P.
 21 12(b)(6) because the Homax products identified in the Complaint cannot—as a matter of law—
 22 constitute "unpatented articles" pursuant to 35 U.S.C. § 292. Therefore, the Court must dismiss
 23 SFT's allegations against Homax under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon
 24 which relief can be granted.

25 _____
 26 ¹ Homax has also sought dismissal of SFT's claims against Homax pursuant to Rule 12(b)(6)
 27 under Rules 8(a) and/or 9(b). (Dkt. 153). The instant Motion merely provides an additional
 28 basis supporting dismissal pursuant to Rule 12(b)(6) and should be considered a supplement and
 amendment to the previous motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

SFT alleges that Homax and twenty-four other defendants have violated the false patent marking statute, 35 U.S.C. § 292, which imposes civil penalties for falsely marking unpatented articles where that marking is done with an intent to deceive the public. As discussed in more detail below, Homax submits that SFT’s claim should be dismissed under Rule 12(b)(6).

II. STATEMENT OF ISSUES TO BE DECIDED

Whether a product marked with both expired and unexpired patent numbers can, as a matter of law, constitute an “unpatented article” under 35 U.S.C. § 292?

III. STATEMENT OF RELEVANT FACTS

SFT filed the instant Complaint on July 8, 2010. (Dkt. 1, Compl.). Over the course of twenty-nine pages and 187 paragraphs, the Complaint alleges that twenty-five unrelated defendants, including Homax, violated 35 U.S.C. § 292 by engaging in false patent marking. (*Id.*) Within the Complaint, SFT identifies two Homax products: “Homax Orange Peel & Knockdown Ceiling Texture Vertical Spray” and “Homax Acoustic Patch Ceiling Repair.” (*Id.* at ¶ 106). SFT alleges that the packages of each of these Homax products are marked with the numbers of eighteen patents and that two of the eighteen patents expired on 5/1/2010 and 8/7/2008. (*Id.* at ¶ 107). The Complaint does not allege that any of the other sixteen patents are expired and likewise does not allege that the two Homax products are not covered by at least one claim of each of the sixteen other patents.

IV. LAW AND ARGUMENT

As stated above, Homax joins in the previously-filed motion of Calico Brands seeking to dismiss SFT’s Complaint under Fed. R. Civ. P. 12(b)(6) and incorporates herein by reference the contents of Calico Brands’ Notice of Motion, Motion, and supporting Memorandum of Points and Authorities. For the reasons set forth therein, and for the further reasons set forth herein, Homax respectfully requests that the Court grant this Motion and dismiss SFT’s claims against Homax pursuant to Rule 12(b)(6) because the Homax products alleged to be falsely marked

cannot, as a matter of law, constitute “unpatented articles” under 35 U.S.C. § 292. Thus, SFT has failed to state a claim upon which relief can be granted.

A. Dismissal For Failure to State A Claim Upon Which Relief Can Be Granted

Under Fed. R. Civ. P. 12(b)(6), a complaint must be dismissed if it fails to state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) can be based on “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). If a complaint is to survive a motion to dismiss, it “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation omitted). In general, the court must accept the factual allegations of the complaint as true and construe them in the light most favorable to the plaintiff. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004). However, when considering a motion to dismiss, “the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Id.* “Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Id.*

B. SFT Fails To State A Claim Upon Which Relief Can Be Granted Because Neither Homax Product Can Be An “Unpatented Article”

The two Homax products that are identified by SFT in the Complaint are aerosol spray texture products.² (Compl. ¶ 107). Both of these Homax products are admittedly marked with sixteen additional patent numbers, for patents not alleged by SFT to be expired, beyond the two patents marked thereupon that SFT alleges are expired. (Compl. ¶ 107). These two Homax products cannot, as a matter of law, be “unpatented articles” because they are still protected by unexpired patents. Notably, there is no allegation by SFT that the sixteen other patents listed on the labels of the two Homax products are expired, and, likewise, no allegation by SFT that any of

² Homax has already pointed out that these two products are not even identified in the Complaint as “unpatented” or “falsely marked.” (See Dkt. 153).

1 these other sixteen patents somehow fails to have at least one claim that covers the Homax
2 product upon which is marked. In other words, SFT's false patent marking allegations against
3 Homax are based *entirely* upon the presence of two expired patent numbers on the two Homax
4 aerosol spray texture products.

5 According to the words of the statute, false patent marking under Section 292 requires
6 marking of an "unpatented article." 35 U.S.C. § 292. Because there is no dispute that both
7 Homax products are covered by multiple unexpired patents, neither of those products can
8 constitute an "unpatented article" *as a matter of law*. Therefore, SFT fails to state a claim upon
9 which relief can be granted and its allegations against Homax should be dismissed.

10 It is common sense that a product marked with eighteen patent numbers, sixteen of which
11 are not expired and are not alleged to be expired, cannot and should not be considered to be
12 unpatented. Likewise, the mere presence of two additional patent numbers, alleged to be for
13 expired patents, marked upon the packaging of such a product cannot somehow transform that
14 product into an "unpatented article." The product is patented by virtue of being protected by the
15 unexpired patents and cannot at the same time be properly called "unpatented." Thus, a product
16 marked with both expired and unexpired patent numbers cannot, as a matter of law, constitute an
17 "unpatented article" under Section 292.

18 This "common sense" conclusion does not conflict with the precedent of the Court of
19 Appeals for the Federal Circuit ("CAFC"), which Court has notably *never* found a product
20 marked with one (or more) expired patent numbers but also marked with other *unexpired* patent
21 numbers to qualify as an "unpatented article" under Section 292. This is because, as discussed
22 below, the CAFC has never considered this issue. In addition, a close review of the CAFC's
23 recent rulings on false patent marking reveals that the CAFC's statements about expired patents
24 and "unpatented articles" were made under different fact scenarios, are merely *dicta* as applied to
25 the Homax products at issue here, and, thus, are not binding upon this Court.

26 Specifically, in *Clontech*, the products at issue were kits and cDNA libraries marked with
27 four *unexpired* patent numbers. *Clontech Labs., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1350

1 (Fed. Cir. 2005). Defendant Invitrogen’s allegation that the marked products were unpatented
2 was based on its argument that when the claims within the four patents were properly construed,
3 none of those claims covered the marked products. 406 F.3d at 1350. Notably, *Clontech* did not
4 involve any allegations of marking products with expired patent numbers. During the course of
5 discussing Section 292, the CAFC stated that “[w]hen the statute refers to an ‘unpatented article’
6 the statute means that the article in question is not covered by at least one claim of each patent
7 with which the article is marked.” *Id.* at 1352. The CAFC’s statement must be understood in the
8 context of the *Clontech* facts and allegations of false patent marking, which did not involve
9 expired patents. Thus, the CAFC’s statement is *dicta* if applied to a situation such as the one at
10 hand involving Homax’s aerosol spray texture products—which are not disputed to be covered
11 by numerous *unexpired* patents. Therefore, this Court is not bound in any way to follow the
12 *Clontech* statement in deciding whether the existence of expired patent numbers along with
13 unexpired patent numbers on a product is sufficient to render those products “unpatented
14 articles” or whether such products cannot, as a matter of law, constitute an “unpatented article”
15 under Section 292.

16 Similarly, the false patent marking allegations at issue in *Forest Group* also involved
17 allegations that the claims of the ‘515 patent—when properly construed—did not actually cover
18 the products marked with the ‘515 patent number. *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d
19 1295, 1299 (Fed. Cir. 2009). More specifically, the allegations of false patent marking relied
20 upon the fact that the claims of the ‘515 patent had been construed in a previous litigation in such
21 a manner as to lead to a finding that an accused product lacking a “resiliently lined yoke” did not
22 infringe. 590 F.3d at 1299. Thereafter, according to Bon Tool, Forest Group continued to mark
23 its own product (which similarly lacked a “resiliently lined yoke”) with the ‘515 patent number.
24 *Id.* None of the false patent marking allegations in *Forest Group* involved marking with expired
25 patents, and, thus, the CAFC’s decision did not address whether marking with an expired patent
26 number could constitute false patent marking. Therefore, *Forest Group* does not bind this Court
27 to find that the mere existence of two expired patent numbers upon products labeled with sixteen
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1 other patent numbers—for patents not alleged to be expired—is sufficient to render either of
2 those products an “unpatented article.”

3 The Federal Circuit has dealt with false patent marking allegations involving expired
4 patents in *Pequignot v. Solo Cup Co.*, 608 F.3d 1356 (Fed. Cir. 2010). However, the marked
5 products in *Solo Cup* were marked with *only* expired patent numbers. In other words, the
6 products at issue were not also marked with unexpired patent numbers that were not disputed to
7 cover the marked products. Thus, the CAFC’s statement in *Solo Cup* that “an article covered by
8 a now-expired patent is ‘unpatented’” must be considered in the context of the facts involved in
9 that case—products marked with only expired patent number. 608 F.3d at 1361. Further, when
10 other statements made by the CAFC in *Solo Cup* are examined, the only reasonable conclusion
11 that can be drawn is that the CAFC’s statement about expired patents must be applied narrowly
12 and limited to only those cases involving the same facts as at issue in *Solo Cup*, i.e., marked with
13 *only* expired patent numbers. Extending the statements beyond that point, renders them *dicta*.

14 More specifically, the *Solo Cup* Court also stated, while citing with approval statements
15 by the district court, that “an article that is no longer protected by a patent is not ‘patented,’ and
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1 is more aptly described as ‘unpatented.’”³ 608 F.3d at 1361. Any attempt to apply this statement
 2 to a situation involving a product marked with *both* expired *and* unexpired patent numbers
 3 renders the statement nonsensical. Clearly, a product that is marked with both unexpired patent
 4 numbers and an expired patent numbers or number, *is* still protected by a patent and cannot be
 5 described as “unpatented.” The *Solo Cup* Court also continued on to state that “[a]s it [i.e., the
 6 marked article or product] is no longer patented, the public need not fear an infringement suit
 7 any more than if it were never patented.” *Id.* Again, this statement is nonsensical when one
 8 attempts to apply it to a situation such as the one at hand, because one who copies or “knocks
 9 off” a product that is marked with *both* expired *and* unexpired patent numbers would be subject
 10 to an infringement suit. Thus, nothing in the CAFC’s *Solo Cup* decision prevents this Court
 11 from deciding that Homax’s aerosol spray texture products cannot—as a matter of law—be
 12 “unpatented” because, in addition to being marked with expired patent numbers, they are

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 15 ³ It is also instructive to examine the district court’s opinion in detail 540 F. Supp. 2d 649 (E.D.
 16 Va. 2008) (Brinkema, J.). The court begin by examining the language of the false patent
 17 marking statute and setting forth the parties’ positions on interpretation of that statute. Notably,
 18 the defendant’s position, which the district court adopted, was that “the term [unpatented article]
 19 refers to any article that is not presently protected by a patent.” 540 F. Supp. 2d at 652. The
 20 district court also pointed out that in *Clontech*, the CAFC “did not further explain whether the
 21 article in question had to be covered by a claim in an *enforceable* patent, which is the issue
 22 before this Court.” *Id.* at 651. The court went on to state that “[t]he meaning of ‘unpatented
 23 article’ is, in all respects, a question of first impression.” *Id.* In reaching its conclusion that
 24 marking with only expired patent numbers was sufficient to render the articles-at-issue
 25 “unpatented,” the Court made numerous statements that make sense only when the facts at issue
 26 in *Solo Cup* (i.e., marking with *only* an expired patent number) are taken into account. First, the
 27 court stated that “[a]n article was once protected by a now-expired patent is no different than an
 28 article that has never received protection from a patent. Both are in the public domain.” *Id.* at
 652. This statement clearly does not and cannot apply to an article that in addition to having
 been once protected by a now-expired patent is also protected by unexpired patents. Such an
 article is *not* in the public domain. Second, the district court referenced the doctrine of double
 patenting and stated (incorrectly) that the marked articles at issue (lids) “are ‘unpatentable’
 because they cannot be the subject of another valid patent” and they are “‘unpatented’ as they are
 not presently protected by a valid patent.” *Id.* at 653. Again, that statement makes sense only if
 the article at issue is marked *only* with expired patent numbers. Finally, the district court pointed
 to public policy considerations stating that “there is an ‘important public policy interest in
 permitting full and free competition in the use of ideas which are in reality a part of the public
 domain.’” *Id.* Again, the Homax products at issue here—two aerosol spray texture products—
 are not in the public domain as they are not disputed to be covered by the sixteen other unexpired
 patents with which they are marked.

1 indisputably also marked with numerous unexpired patents that are not disputed to cover the
2 products.

3 Similarly, the most recent case false patent marking case decided by the CAFC, *Stauffer*
4 *v. Brooks Brothers, Inc.*, also involved allegations of false patent marking based on the marking
5 of bow ties with only expired patent numbers. – F.3d ---, 2010 WL 3397419 (Fed. Cir. Aug. 31,
6 2010). Therefore, it is not surprising that neither the district court decision (*Stauffer v. Brooks*
7 *Brothers, Inc.*, 615 F. Supp.2d 248 (S.D.N.Y. 2009)), nor the CAFC’s decision contained any
8 discussion of false patent marking in the context of expired patent numbers. Thus, the CAFC’s
9 *Stauffer* decision is seemingly irrelevant in terms of determining whether the type of false patent
10 marking alleged against Homax is even capable of constituting false patent marking.

11 As discussed in detail above, Homax respectfully request that this Court hold that a
12 product marked with multiple patent numbers some of which are expired and others of which are
13 not expired, is insufficient, as a matter of law, to constitute an “unpatented article” under 35
14 U.S.C. § 292(b). Such a holding is supported by the statutory language of the false patent
15 marking statute and a common sense understanding of the term “unpatented article” which
16 simply cannot by any reasonable application of logic be found applied to a product that is still
17 covered by the claims of unexpired patents. Moreover, such a holding is not in conflict with
18 Federal Circuit cases stating that “an article covered by a now-expired patent is ‘unpatented’
19 (*Solo Cup, supra*) or that “the statute means that the article in question is not covered by at least
20 one claim of each patent with which the article is marked” (*Clontech, supra*), because neither of
21 those cases involved products marked with both expired and unexpired patent numbers.
22 Therefore, Homax requests that this Court find the two Homax products identified in the
23 Complaint cannot, as a matter of law, be “unpatented articles” and that, therefore, SFT has failed
24 to state a claim upon which relief can be granted.

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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
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12 SAN FRANCISCO TECHNOLOGY INC.,
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14 Plaintiff,

15 v.

16 AERO PRODUCTS INTERNATIONAL INC.
17

et al.,

18 Defendants.
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Case No. 10 CV-02994-JF

**[PROPOSED] ORDER ON HOMAX
PRODUCTS, INC.'S MOTION TO
DISMISS PURSUANT TO RULE 12(B)(6)**

Judge: Hon. Judge Jeremy Fogel
Date: November 19, 2010
Time: 11:00 a.m.
Courtroom: Courtroom 3, 5th Floor

20
21 Defendant Homax Products, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6)
22 came for hearing on November 19, 2010, at 11:00 a.m. in this Court. Counsel for
23 Defendant and for Plaintiff were in attendance and presented oral arguments. Having
24 considered the parties' papers filed in support of and in opposition to the motion, oral
25 argument, and other pleadings and papers on file herein, the Court finds the following:

1 **IT IS ORDERED** that Defendant Homax Products, Inc.'s Motion to Dismiss
2 Pursuant to Rule 12(b)(6) is **GRANTED**.

3 **IT IS SO ORDERED.**

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5 Dated:

The Honorable Jeremy Fogel
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The foregoing MOTION FOR ADMINISTRATIVE RELIEF TO PERMIT DEFENDANT HOMAX PRODUCTS, INC. TO SUPPLEMENT AND AMEND ITS PENDING MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) was filed electronically on October 15, 2010. Notice of this filing will be sent by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/

Rosemary A. Comisky Culiver